



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TANYA TAGLE,

Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security
Administration,

Defendant.

Case No. CV-11-7093-SP

MEMORANDUM OPINION AND
ORDER

I.

INTRODUCTION

On October 14, 2011, plaintiff Tanya Tagle filed a first amended complaint against defendant Michael J. Astrue, seeking a review of a denial of supplemental security income (“SSI”). Both plaintiff and defendant have consented to proceed for all purposes before the assigned Magistrate Judge pursuant to 28 U.S.C. § 636(c). The court deems the matter suitable for adjudication without oral argument.

Plaintiff presents one disputed issue for decision: whether the administrative law judge (“ALJ”) properly considered plaintiff’s credibility.

1 Memorandum of Points and Authorities in Support of Plaintiff's Complaint ("Pl.
2 Mem.") at 4-12; Memorandum in Support of Defendant's Answer ("D. Mem.") at
3 2-3.

4 Having carefully studied, inter alia, the parties's written submissions, the
5 Administrative Record ("AR"), and the decision of the ALJ, the court concludes
6 that, as detailed herein, the ALJ improperly discounted plaintiff's credibility.

7 Therefore, the court remands this matter to the Commissioner of the Social
8 Security Administration ("Commissioner") in accordance with the principles and
9 instructions enunciated in this Memorandum Opinion and Order.

10 II.

11 FACTUAL AND PROCEDURAL BACKGROUND

12 Plaintiff, who was 39 years old on the date of her December 10, 2009
13 administrative hearing, is a high school graduate with a certificate for medical
14 assisting. AR at 53, 76. Her past relevant work includes employment as a retail
15 sales clerk and pharmacy clerk. *Id.* at 98.

16 On January 16, 2007, petitioner, unrepresented, filed an application for
17 disability insurance benefits and SSI, alleging an onset date of January 1, 2007.¹
18 *Id.* at 108. ALJ Philip J. Simon denied the claim at the first step. *Id.* at 111.

19 On September 17, 2008, petitioner filed a second application for SSI,
20 alleging an onset date of June 22, 2007, due to scoliosis, depression, anxiety,
21 degenerative disc disease, arthritis, and fibromyalgia. *Id.* at 126, 157-63, 200, 205.
22 The Commissioner denied plaintiff's application initially, after which she filed a
23 request for a hearing. *Id.* at 126-31.

24
25
26 ¹ The Administrative Record does not contain the paperwork for the January
27 16, 2007 application, but based on the decision, it appears that plaintiff alleged
28 disability due to lower back pain, obesity, kidney stones, and ankle sprain. AR at
112.

1 On December 10, 2009, petitioner, represented by counsel, appeared and
 2 testified at a hearing before ALJ Michael J. Kopicki. *Id.* at 71-104. Howard
 3 Goldfarb, a vocational expert, also provided testimony. *Id.* at 98-103. The ALJ
 4 denied benefits on December 21, 2009.² *Id.* at 25-35.

5 Applying the well-known five-step sequential evaluation process, the ALJ
 6 found, at step one, that plaintiff had not engaged in substantial gainful activity
 7 since June 22, 2007, the alleged onset date. *Id.* at 28.

8 At step two, the ALJ found that plaintiff suffered from the following severe
 9 impairments: fibromyalgia; degenerative disc disease of the lumbar spine; and
 10 obesity. *Id.*

11 At step three, the ALJ found that plaintiff's impairments did not meet or
 12 medically equal one of the listed impairments set forth in the Listings. *Id.* at 29.

13 The ALJ then assessed plaintiff's residual functional capacity ("RFC")³ and
 14 determined that she had the RFC to perform sedentary work with the following
 15 limitations, plaintiff: could stand/walk for two hours in an eight-hour day; could
 16 sit for six hours in an eight-hour day; was precluded from climbing ladders, ropes,
 17

18 ² A prior finding of non-disability creates a presumption of continuing non-
 19 disability, but the presumption will not apply if there are changed circumstances.
 20 *Lester v. Chater*, 81 F.3d 821, 827-28 (9th Cir. 1996) (as amended); *Chavez v.*
 21 *Bowen*, 844 F.2d 691, 693-94 (9th Cir. 1988). Although the Social Security
 22 Administration determined that *Chavez* applied (AR at 123-35), the ALJ
 23 concluded that there were changed circumstances. *Id.* at 26. Further, *Chavez* is
 24 inapplicable when the claimant is unrepresented in the prior claim. *Lester*, 81 F.3d
 25 at 827-28.

26 ³ Residual functional capacity is what a claimant can do despite existing
 27 exertional and nonexertional limitations. *Cooper v. Sullivan*, 880 F.2d 1152,
 28 1155-56 n.5-7 (9th Cir. 1989). "Between steps three and four of the five-step
 evaluation, the ALJ must proceed to an intermediate step in which the ALJ
 assesses the claimant's residual functional capacity." *Massachi v. Astrue*, 486
 F.3d 1149, 1151 n.2 (9th Cir. 2007).

1 or scaffolds; could occasionally balance, stoop, crouch, and crawl; and must avoid
2 concentrated exposure to temperature extremes and hazards such as dangerous
3 machinery and unprotected heights. *Id.* at 30.

4 The ALJ found, at step four, that plaintiff was unable to perform her past
5 relevant work. *Id.* at 33.

6 At step five, the ALJ found that there were jobs that existed in significant
7 numbers in the national economy that plaintiff could perform, including lens
8 inserter, optical assembler, and jewelry preparer. *Id.* at 33-34. Consequently, the
9 ALJ concluded that plaintiff did not suffer from a disability as defined by the
10 Social Security Act. *Id.* at 34.

11 Plaintiff filed a timely request for review of the ALJ's decision, which was
12 denied by the Appeals Council. *Id.* at 7-9, 17. After considering additional
13 information submitted by plaintiff, the Appeals Council again denied plaintiff's
14 request. *Id.* at 1-3. The ALJ's decision stands as the final decision of the
15 Commissioner.

16 III.

17 STANDARD OF REVIEW

18 This court is empowered to review decisions by the Commissioner to deny
19 benefits. 42 U.S.C. § 405(g). The findings and decision of the Commissioner
20 must be upheld if they are free of legal error and supported by substantial
21 evidence. *Mayes v. Massanari*, 276 F.3d 453, 458-59 (9th Cir. 2001) (as
22 amended). But if the court determines that the ALJ's findings are based on legal
23 error or are not supported by substantial evidence in the record, the court may
24 reject the findings and set aside the decision to deny benefits. *Aukland v.*
25 *Massanari*, 257 F.3d 1033, 1035 (9th Cir. 2001); *Tonapetyan v. Halter*, 242 F.3d
26 1144, 1147 (9th Cir. 2001).

1 “Substantial evidence is more than a mere scintilla, but less than a
2 preponderance.” *Aukland*, 257 F.3d at 1035. Substantial evidence is such
3 “relevant evidence which a reasonable person might accept as adequate to support
4 a conclusion.” *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998); *Mayes*, 276
5 F.3d at 459. To determine whether substantial evidence supports the ALJ’s
6 finding, the reviewing court must review the administrative record as a whole,
7 “weighing both the evidence that supports and the evidence that detracts from the
8 ALJ’s conclusion.” *Mayes*, 276 F.3d at 459. The ALJ’s decision “cannot be
9 affirmed simply by isolating a specific quantum of supporting evidence.”
10 *Aukland*, 257 F.3d at 1035 (quoting *Sousa v. Callahan*, 143 F.3d 1240, 1243 (9th
11 Cir. 1998)). If the evidence can reasonably support either affirming or reversing
12 the ALJ’s decision, the reviewing court “may not substitute its judgment for that
13 of the ALJ.” *Id.* (quoting *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir.
14 1992)).

15 IV.

16 DISCUSSION

17 Plaintiff contends that the ALJ failed to properly consider plaintiff’s
18 credibility. Pl. Mem. at 4-12. Specifically, plaintiff argues that neither of the two
19 reasons the ALJ provided for discounting plaintiff’s credibility – the testimony
20 was not supported by objective medicine and was inconsistent with plaintiff’s
21 daily activities – were clear and convincing. *Id.* In fact, the ALJ did not cite
22 inconsistency with plaintiff’s daily activities as a reason for discounting plaintiff’s
23 credibility. In support of her argument, plaintiff cites to page 48 of the record, but
24 page 48 is the cover page for the March 10, 2008 hearing for plaintiff’s prior
25 claim. Pl. Mem. at 9. But although much of plaintiff’s argument is based on this
26 factual misstatement, the court agrees that the ALJ failed to provide clear and
27 convincing reasons for rejecting plaintiff’s testimony.
28

1 The ALJ must make specific credibility findings, supported by the record.
2 SSR 96-7p. To determine whether testimony concerning symptoms is credible, the
3 ALJ engages in a two-step analysis. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-
4 36 (9th Cir. 2007). First, the ALJ must determine whether a claimant produced
5 objective medical evidence of an underlying impairment ““which could reasonably
6 be expected to produce the pain or other symptoms alleged.”” *Id.* at 1036 (quoting
7 *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991) (en banc)). Second, if there
8 is no evidence of malingering, an “ALJ can reject the claimant’s testimony about
9 the severity of her symptoms only by offering specific, clear and convincing
10 reasons for doing so.” *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996);
11 *Benton v. Barnhart*, 331 F.3d 1030, 1040 (9th Cir. 2003). The ALJ may consider
12 several factors in weighing a claimant’s credibility, including: (1) ordinary
13 techniques of credibility evaluation such as a claimant’s reputation for lying; (2)
14 the failure to seek treatment or follow a prescribed course of treatment; and (3) a
15 claimant’s daily activities. *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir.
16 2008); *Bunnell*, 947 F.2d at 346-47.

17 At the first step, the ALJ found that plaintiff’s medically determinable
18 impairments could reasonably be expected to cause the symptoms alleged. AR at
19 31.

20 At the second step, the ALJ noted that a treating neurologist suspected that
21 plaintiff was not giving good effort and possibly “making it up” (*id.* at 31, 356),
22 but did not state that he found this to be affirmative evidence of malingering.⁴ As
23

24 ⁴ The treatment records indicate that three physicians suspected plaintiff of
25 malingering: (1) Dr. Van Duong noted that there was “very questionable pain” in
26 plaintiff’s right flank (AR at 310); (2) Dr. Adelaide Willis suspected that plaintiff
27 may have “secondary gain in terms of trying to apply for disability” (*id.* at 303);
28 and (3) Dr. Kaleem Uddin “got the impression that [plaintiff was] not giving good
effort” and one possibility for her pain was that she was “making it up just to get

1 such, the ALJ was required to provide clear and convincing reasons for
2 discounting plaintiff's credibility. Here, the ALJ found plaintiff's statements
3 concerning the intensity, persistence, and limiting effects of her symptoms not
4 credible to the extent they were inconsistent with her RFC because: (1) the
5 symptoms were not supported by the objective findings; and (2) the symptoms
6 were inconsistent with plaintiff's treatment history.⁵ *Id.* at 31-32. The ALJ's
7 reasons were not clear and convincing.

8 First, the ALJ erred in relying on the lack of objective medical evidence to
9 support her claims. An ALJ "may not reject a claimant's subjective complaints
10 based solely on a lack of objective medical evidence to fully corroborate the
11 alleged severity of pain," but it may be one factor used to evaluate credibility.
12 *Bunnell*, 947 F.2d at 345; *see also Rollins v. Massanari*, 261 F.3d 853, 856 (9th
13 Cir. 2001). Here, the ALJ noted that plaintiff had no remarkable findings
14 including no fracture, dislocation, and nerve root impingement, and negative
15 serology tests. AR at 31-32. But the ALJ also recognized that over time the focus
16 of plaintiff's "diagnosis shifted to fibromyalgia" (*id.* at 32), and fibromyalgia was
17 the alleged cause of plaintiff's pain. Fibromyalgia is a disease that "is diagnosed
18 entirely on the basis of patient's reports of pain and other symptoms." *Benecke v.*
19 *Barnhart*, 379 F.3d 587, 590 (9th Cir. 2004). Its causes are unknown and there are
20 no laboratory tests for the presence or severity of it. *Rollins*, 261 F.3d at 855
21 (citing *Sarchet v. Chater*, 78 F.3d 305, 306 (7th Cir. 1996)); *see also Brosnahan v.*
22 *Barnhart*, 336 F.3d 671, 672 n.1 (8th Cir. 2003) (a fibromyalgia diagnosis "is

23
24
25 off of work" (*id.* at 356).

26 ⁵ Although the ALJ also rejected plaintiff's symptoms regarding her alleged
27 mental impairments, this court will only discuss plaintiff's credibility as it pertains
28 to her physical impairments. Plaintiff does not dispute the ALJ's finding that she
did not have a severe mental impairment.

1 usually made after eliminating other conditions as there are no confirming
2 diagnostic tests”). The only symptom distinguishing it is evidence of at least
3 eleven out of eighteen tender points. *Rollins*, 261 F.3d at 855; *see also Jordan v.*
4 *Northrop Grumman Corp. Welfare Benefit Plan*, 370 F.3d 869, 872 (9th Cir.
5 2004), *abrogated on other grounds by Abatie v. Alta Health & Life Ins. Co.*, 458
6 F.3d 955, 969 (9th Cir. 2006). And here, two physicians found multiple tender
7 points.⁶ AR at 386, 445.

8 The ALJ also cited the examination findings of plaintiff’s treating
9 rheumatologist, Dr. Buhay, and consultative examiner, Dr. To, as further objective
10 evidence that failed to support plaintiff’s claims.⁷ AR at 32. Both found that
11 despite the multiple tender points, plaintiff had good range of motion. *Id.* But a
12 good range of motion is not substantial evidence of less severe symptoms. *See,*
13 *e.g., Meehan v. Astrue*, No. 11-01310, 2012 WL 3778347, at *4 (C.D. Cal. Aug.
14 30, 2012) (citing *Green-Young v. Barnhart*, 335 F.3d 99, 108-09 (2d Cir. 2003)
15 (explaining that fibrositis patients usually show full range of motion during
16 physical examinations)). Thus, the lack of objective findings is not a clear and
17 convincing reason for rejecting plaintiff’s statements concerning the severity of
18 her fibromyalgia.

19 Second, the ALJ erroneously discounted plaintiff’s credibility based on her
20 treatment history. Although “evidence of ‘conservative treatment’ is sufficient to
21 discount a claimant’s testimony regarding severity of an impairment,” plaintiff did
22

23 ⁶ Neither Dr. Ma. Susan A. Buhay nor Dr. Sean To stated the number of
24 tender points found. AR at 386, 445.

25 ⁷ Dr. To opined that plaintiff’s condition was mild due, in part, to her ability
26 to get up and down the examination table with minimal difficulty. *Id.* at 445. Dr.
27 Buhay, in contrast, opined that plaintiff’s fibromyalgia was “fairly active.” *Id.* at
28 548-49. The ALJ failed to give specific and legitimate reasons for discounting Dr.
Buhay’s opinion. *See Lester*, 81 F.3d at 830-31.

1 not receive conservative treatment. *See Parra v. Astrue*, 481 F.3d 742, 751 (9th
2 Cir. 2007); *see also Tommasetti*, 533 F.3d at 1040 (conservative treatment may be
3 a clear and convincing reason for discounting a claimant's credibility). As the
4 ALJ
5 correctly noted, plaintiff's physicians treated plaintiff's degenerative disc disease
6 and fibromyalgia with a caudal epidural steroid injection, a series of trigger point
7 injections, physical therapy, and pain relievers. *Id.* at 31, 344-45, 353-55; *see e.g.*,
8 *id.* at 420-22, 476. While physical therapy and pain medication are conservative,
9 epidural and trigger point injections are not. *See Tommasetti*, 533 F.3d at 1040
10 (describing physical therapy and anti-inflammatory medication as conservative
11 treatment); *Christie v. Astrue*, No. 10-3448, 2011 WL 4368189, at *4 (C.D. Cal.
12 Sept. 16, 2011) (refusing to characterize steroid and trigger point injections as
13 conservative). And contrary to the ALJ's conclusion, there was no substantial
14 evidence that plaintiff's symptoms were well controlled with the use of
15 medication. *See AR* at 31. Nor did the trigger point injections render significant
16 relief. *Id.* at 353.

17 More important, there is no cure for fibromyalgia. *Benecke*, 379 F.3d at
18 589-90. Thus, the ALJ was wrong to note the lack of referral for surgery as of
19 significance. *See AR* at 31. Indeed, there is no evidence that any particular course
20 of treatment would have alleviated plaintiff's symptoms. *See, e.g., Trujillo v.*
21 *Astrue*, No. 11-1220, 2011 WL 5870080, at *5 (C.D. Cal. Nov. 22, 2011) (strong
22 medications and physical therapy qualified as substantial treatment of
23 fibromyalgia).

24 In short, the ALJ failed to provide clear and convincing reasons supported
25 by substantial evidence for discounting plaintiff's credibility.

V.

REMAND IS APPROPRIATE

The decision whether to remand for further proceedings or reverse and award benefits is within the discretion of the district court. *McAllister v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989). Where no useful purpose would be served by further proceedings, or where the record has been fully developed, it is appropriate to exercise this discretion to direct an immediate award of benefits. *See Benecke*, 379 F.3d at 595-96; *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000) (decision whether to remand for further proceedings turns upon their likely utility). But where there are outstanding issues that must be resolved before a determination can be made, and it is not clear from the record that the ALJ would be required to find a plaintiff disabled if all the evidence were properly evaluated, remand is appropriate. *See Benecke*, 379 F.3d at 595-96; *Harman*, 211 F.3d at 1179-80.

Here, as set out above, remand is required because the ALJ erred in failing to properly evaluate plaintiff's credibility. On remand, the ALJ shall reconsider plaintiff's subjective complaints with respect to her physical impairments and resulting limitations, and either credit plaintiff's testimony, provide affirmative evidence that plaintiff is a malingerer, or provide clear and convincing reasons supported by substantial evidence for rejecting plaintiff's subjective complaints. The ALJ shall then proceed through steps four and five to determine what work, if any, plaintiff is capable of performing.

VI.

CONCLUSION

IT IS THEREFORE ORDERED that Judgment shall be entered REMANDING the decision of the Commissioner denying benefits, and dismissing this action with prejudice.

DATED: September 21, 2012

A handwritten signature in black ink, appearing to read 'SHERI PYM', written over a horizontal line.

SHERI PYM
United States Magistrate Judge